

ORIGINAL

NUMBER:

ALVIN R. MOORE, JR.

VERSUS

FRANK BLACKBURN, WARDEN  
LOUISIANA STATE PENITENTIARY

(Death Penalty Execution  
Set October 7, 1985)

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Brief in Opposition

85-5555

ANSWER TO PETITION FOR STAY OF EXECUTION

Supreme Court, U.S.  
FILED  
DEC 5 1985

NOW INTO COURT comes the State of Louisiana, who responds  
to the petition for a stay of execution in the above captioned  
case as follows:

1.

GRIGSBY ISSUE

Petitioner claims that the exclusion from capital cases  
of prospective jurors who would automatically vote against the  
death penalty is unconstitutional.

FIRST RESPONSE.

The "Grigsby" issue is not applicable to this case. In  
this case the State of Louisiana used only five of a possible  
twelve peremptory challenges. Only four people were excused for  
cause due to their inability under any circumstances to impose the  
death penalty. (Juror McKenzie was excused for cause as an alternate  
juror and no alternates were used.) The four jurors, Henderson,  
Dingman, Teal and Lyles were excused for cause because of their  
strong beliefs against the death penalty and their refusal to con-  
sider such a sentence. The State of Louisiana used only five  
peremptory challenges (jurors Johnson, Hill, Murray, Chambers and  
Mothershed).

EDITOR'S NOTE

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If the State had used four peremptory challenges on the jurors excused for cause, its total would have been nine leaving three additional challenges unused. The defense used only six challenges although it also had available twelve peremptory challenges. Therefore, the issue raised in Grigsby is moot.

#### SECOND RESPONSE.

The four jurors who were challenged for cause expressed strong beliefs against capital punishment but were not questioned in connection with whether or not they could have returned a verdict of guilty at the first phase of the trial. Therefore, the foundation was not laid for this issue.

#### THIRD RESPONSE.

Petitioner has already raised this issue unsuccessfully before this Honorable Court. In Moore v. Maggio, 740 F.2d, 308 (1984) the United States Fifth Circuit Court of Appeals specifically rejected the Grigsby argument and the United States Supreme Court refused to grant writs on June 24, 1985, and denied an application for a rehearing on the exact same Grigsby issue on August 28, 1985.

In Spinkellink v. Wainwright, 578 F.2d, 582 the same argument presented in Grigsby was denied by the U.S. Fifth Circuit Court of Appeals and certiorari denied by the United States Supreme Court. In Knighton v. Maggio, 740 F.2d 1344 (1984), the Fifth Circuit again denied the Grigsby argument and

certiorari was not granted by the U.S. Supreme Court. Both Spinkellink and Knighton were executed. Petitioner is not entitled to another of many last minute stays of execution for issues already raised before all the courts in Louisiana and the United States.

#### 2.

##### PROSECUTOR'S ARGUMENT

Petitioner claims that the argument of the prosecutor was constitutionally impermissible. Petitioner has raised this issue in previous pleadings but now cites a new decision. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). In Caldwell, the Supreme Court ruled that a prosecutor may not lead jurors to believe that the responsibility lies elsewhere for the death penalty. The argument of the prosecutor in the present case was much different than that presented in Caldwell. In the present case, the prosecutor emphasized to the jury that it was their responsibility to return a death penalty and that petitioner would never be executed unless they took and accepted this responsibility. The part quoted in the petition is out of context, but, even so, demonstrates that the prosecutor was placing the responsibility solely upon the shoulders of the jury. Specifically, the prosecutor told the jury that it must start with them and that "it has to begin here, right here with the jury".

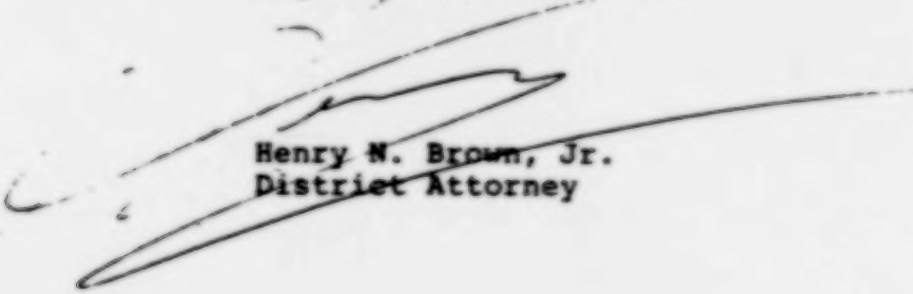
It is clear that the prosecutor was emphasizing to the jury that the issue of the petitioner's life or death was solely in their hands. Specifically, the prosecutor said:

"And it's a tough thing to ask, but there is only one penalty really available for this type of crime, and that is the death penalty. This is where it will begin. From the next point forward, it goes through the court system to be thoroughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury. And it's not an easy thing to ask for and it's not an easy thing for you to give. But if we are going to stop this type of useless and senseless violence against people there is only one way to stop it, and that's right here."

It is obvious that the D.A. was placing the sole responsibility on the jury and not the courts of review. Additionally, no objection was made by the defense attorney. The prosecutor's argument was short and no rebuttal argument was made. Caldwell does not apply to this case and this issue has been decided in this case by the U.S. Fifth Circuit.

WHEREFORE, the State of Louisiana prays that this petition for stay be denied.

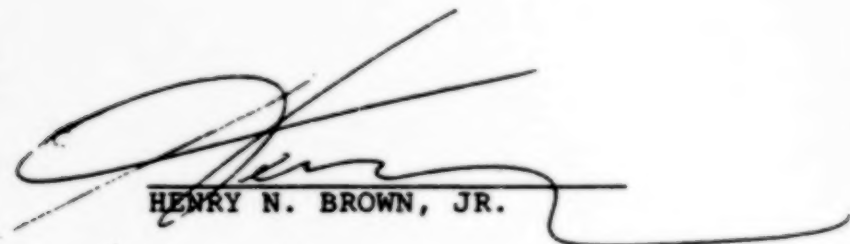
Respectfully submitted,

  
Henry N. Brown, Jr.  
District Attorney

CERTIFICATE

I hereby certify that a copy of the foregoing has been mailed this day through the U.S. mail with proper postage affixed to Mr. Welborn Jack, Jr. , Attorney at Law, 101 Milam Street, Shreveport, LA 71101.

BENTON, LOUISIANA this 30<sup>th</sup> day of September, 1985.

  
HENRY N. BROWN, JR.